

WHEN RIGHT EQUALS RIGHTS

The international obligation to provide assistance to developing countries

KIRSTY NOWLAN AND TIM COSTELLO

Human rights and fundamental freedoms are the birthright of all human beings; their protection and promotion is the first responsibility of Governments.¹

The emergence of a unanimous consensus that the primary purpose of government is the realisation of human rights is one of the most profound narratives of the second half of the 20th century. In one sense, it also represents a triumph for the transformative potential of law. Prior to the Second World War, many of the actions perpetrated by the Nazis were protected by the cloak of 'domestic jurisdiction' or 'territorial sovereignty'; the international legal doctrine according to which the internal affairs of a nation state were held to be closed to the scrutiny of external parties. By articulating the means through which governments can be held accountable to an external standard, international human rights law has provided the architecture through which the international community has been able to name violations of human dignity as being not only immoral, but illegal. The maintenance of sovereignty is increasingly being seen as dependent on governments' abilities to ensure that the rights of their citizens are protected.

It goes almost without saying that the high-minded rhetoric associated with human rights law has not always translated into reality. Hundreds of millions of people experience violations of their rights on a daily basis. The failure to realise the promise of the *International Covenant on Economic, Social and Cultural Rights* (ICESCR) is particularly stark.² The 1.2 billion people living on less than US\$1 a day experience an almost continuous violation of their rights. In contrast with civil and political rights, there is a reluctance to view the continuation of extreme poverty as representing a mass violation of human rights. According to Scott Leckie:

when a person's right to speak freely is restricted, observers almost unconsciously hold the state responsible. However, when people die of hunger or thirst ... the world still tends to blame nameless economic or 'developmental forces'.³

Where, one might ask, is the moral outrage that should attend the almost unfathomable statistics on the numbers of deaths caused by poverty? The outpouring of sorrow and empathy that was expressed by Australians in response to the Indian Ocean tsunami in 2004 was apposite to the scale of that event. And yet, in a span of only four days, the same number of children die of poverty-related diseases as were killed during the tsunami. It is clearly important to exercise caution before characterising the governments of low

income nations as human rights violators. While there is little doubt there are some that deserve the title, often governments simply do not have access to sufficient resources to provide for even the most basic rights of their citizens. The ICESCR anticipates this limitation and provides, in art 2, that rights must be realised by a state using the 'maximum of its available resources, with a view to achieving progressively the full realization' of the rights. It is important to note that art 2 also makes it clear that it is the responsibility of all states, in their capacity as members of the international community, to 'take steps' to assist in realisation of rights of people beyond their borders.

In this article we aim to focus on the responsibilities of the international community in relation to the realisation of economic, social and cultural rights. We are particularly interested in the obligations of wealthy nations (as defined by their membership of the Development Assistance Committee of the Organisation for Economic Cooperation and Development). We hold that there is a clear legal obligation on the part of all nation state members of the international community to provide assistance under international human rights law and that many developed countries, including Australia, are failing to properly discharge their obligations. If human rights are to be regarded as universal, then the accident of birth that establishes where most people live cannot determine who gets to enjoy the full range of economic, social and cultural rights.

The obligation to provide development assistance and cooperation under international law

Developed countries have consistently denied that the official development assistance (ODA or 'aid') they provide to the developing world can be regarded as the result of a legally binding obligation. This denial is an impediment to the development of a customary legal obligation to provide aid given that the entrenchment of such norms is dependent on whether states consider an obligation of action or omission to be legally binding in nature as well as whether such actions comprise general safe practice. Whether, however, such a denial is a valid objection under international treaty obligations is a complex issue. Article 56 of the *Charter of the United Nations* ('UN Charter') commits states to take both 'joint and separate action' for the realisation of the purposes set out in art 55, which includes the realisation of 'human rights and fundamental freedoms

REFERENCES

1. *Vienna Declaration and Programme of Action: Report of the World Conference on Human Rights*, UN Doc A/CONF.157/23, art 1 (1993).
2. Opened for signature 16 December 1966, 999 UNTS 3 (entered into force 3 January 1976).
3. Scott Leckie, 'Another Step Towards Indivisibility: Identifying the Key Features of Violations of Economic, Social and Cultural Rights' (1998) 20(1) *Human Rights Quarterly* 82.

for all'.⁴ This injunction is confirmed in the Preamble to, and in arts 22, 28 and 30 of, the *Universal Declaration of Human Rights (UDHR)*, in arts 2, 11, 22 and 23 of the *ICESCR* and other related treaties such as the *Convention on the Rights of the Child (CRC)*.⁵ A range of international conferences at which major international human rights statements have been produced — beginning with the *Proclamation of Teheran* in 1968 and culminating in the *Vienna Declaration and Programme of Action* in 1993 — have affirmed the indivisibility of all human rights.⁶ It is therefore unlikely that states would be successful in arguing that they have the capacity to 'opt out' of their obligations with respect to economic, social and cultural rights.

It would appear then that pursuant to art 56, all states parties to the *UN Charter*, and particularly those who have ratified *ICESCR* and other related treaties like the *CRC*, have contracted into an obligation to provide cooperation and assistance for the realisation of economic, social and cultural rights. The question then becomes one of understanding the nature of this obligation. While *ICESCR* holds states primarily responsible for ensuring that rights are fulfilled within their jurisdiction, it also enjoins the international community to action. Relevantly, art 2(1) provides:

Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means ...

Using an ordinary construction of the language, art 2(1) requires that the international community assist and cooperate to the maximum of its available resources; international obligations are not separated from the domestic obligations of individual states parties, and the maximum available resources apply to both. Based on this reading, it is difficult to see how wealthy nations could argue that there is no obligation to provide aid, which is clearly an 'appropriate means' of striving towards the realisation of rights. Although aid is a vital element of international aid and assistance, the scope set out within the *ICESCR* is potentially much wider. Even if it is accepted that there is no obligation to provide aid, the international community would not be absolved from the responsibility to assist.

In *General Comment 3: The Nature of States Parties' Obligations (Art 2(1))*, the Committee on Economic, Social and Cultural Rights (CESCR) — the UN body responsible for monitoring the implementation of economic, cultural and social rights — affirmed the obligation of the international community to provide assistance for the realisation of such rights as an obligation under international law.⁷ When considering the point at which violations of rights can be said to have occurred notwithstanding resource limitations, CESCR considers that states parties are under a 'core obligation' to ensure that certain non-derogable 'minimum essential standards' relating to fundamental human rights are met, including in relation to the provision of housing, nutrition and health

care.⁸ It would therefore appear that, at a minimum, international cooperation becomes essential at the point at which the resources within the state prove insufficient to fulfil even these minimum standards. *General Comment 3* supports this interpretation when it notes that the obligation to devote the 'maximum available resources' within a state towards the progressive realisation of economic, social and cultural rights is intended to include resources available through international cooperation and assistance.⁹ At no point does art 2 of the *ICESCR* provide that international cooperation and assistance should cease before full realisation occurs.

The obligation of developed states to provide development assistance and cooperation under international law has recently been confirmed by CESCR in *General Comment 12: The Right to Adequate Food (Art 11)*, in which it refers to the 'commitment to take joint and separate action to achieve full realisation of the right to adequate food' and 'to provide the necessary aid',¹⁰ and *General Comment 15: The Right to Water (Arts 11 and 12)*, in which CESCR affirms that 'economically developed States parties have a special responsibility and interest to assist the poorer developing States'.¹¹

Nature and scope of the obligation to provide development assistance and cooperation

It is generally accepted that obligations of states parties under international human rights law include obligations to *respect, protect and fulfil* human rights. The obligation to fulfil has been further specified as incorporating obligations to facilitate and provide.¹² Most of the discussion and analysis on the specific duties associated with these obligations centres around the actions of states in relation to their own citizens. In order to consider what these obligations mean for the international community, it is worth noting how far states have to go to ensure the realisation of even the core minimum obligations in respect of social and economic rights. It is estimated that approximately 852 million people currently experience chronic hunger.¹³ One of the significant features of the scope of hunger is that it exists notwithstanding the fact that, globally, enough food is produced to provide for all people.¹⁴ The problem is not the availability of food but rather the ability to access food. To give another example, 90% of the 42 million people currently infected with the HIV virus live in middle or low income countries.¹⁵ Only 7% of these people have access to the kind of treatment which is the norm in the developed world.¹⁶

In what follows we intend to provide a snapshot of the kind of obligations suggested by the international obligation to provide assistance. It should be noted that this is by no means an exhaustive list.

From the perspective of the international community, the obligation to 'respect' human rights requires that states refrain from interfering with people's existing ability to access their economic, social and cultural

4. *Charter of the United Nations*, arts 55, 56.

5. *Universal Declaration of Human Rights*, GA Res 217 A (III), UN GAOR, 3rd sess, 183rd plen mtg (1948); *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 43 (entered into force 2 September 1990). Although the *UDHR* is not a legally binding document, it is widely regarded as an authoritative interpretation of the human rights provisions within the *UN Charter* and therefore has been accorded special weight in the consideration of the meaning of art 55.

6. International Conference on Human Rights, *Proclamation of Tehran*, A/CONF.32/41 (1968), endorsed by *Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity*, GA Res 2442 (XXIII), UN GAOR, 23rd sess, 1705th plen mtg, UN Doc A/RES/2391 (III) (19 December 1968).

7. CESCR, *General Comment 3: The Nature of States Parties' Obligations*, UN Doc HRI/GEN/1/Rev.5, [14] (2001) ('*General Comment 3*').

8. *Ibid* [10]; CESCR, *Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights: Poverty and the International Covenant on Economic, Social and Cultural Rights*, UN Doc E/C.12/2001/10, 4–5, [15]–[18] (2001).

9. *Ibid* [13]. See also CESCR, *General Comment 2: International Technical Assistance Measures*, UN Doc HRI/GEN/1/Rev.5, [10] (2001).

10. CESCR, *General Comment 12: The Right to Adequate Food*, UN Doc HRI/GEN/1/Rev.5, 66, [36] (2001).

11. CESCR, *General Comment 15: The Right to Water*, UN Doc E/C.12/2002/11, 12, [34] (2002).

12. CESCR, *General Comment 15: The Right to Water*, UN Doc E/C.12/2002/11, [17]–[29] (2002). See also CESCR, *General Comment 12: The Right to Adequate Food*, UN Doc HRI/GEN/1/Rev.5, 66, [15] (2001) and CESCR, *General Comment 13: The Right to Education*, UN Doc HRI/GEN/1/Rev.5, 74, [47] (2001).

13. Food and Agriculture Organisation, 'The Numbers: SOFI 2004 Hunger Statistics' FAO Newsroom <www.fao.org/newsroom/en/focus/2004/51786/article_51791en.html> at 2 August 2005.

If human rights are to be regarded as universal, then the accident of birth that establishes where most people live cannot determine who gets to enjoy the full range of economic, social and cultural rights.

rights. This obligation pertains to both developed and developing states. When states are negotiating agreements on any number of issues, the clear expectation within international human rights law is that the obligation to respect human rights is an integral part of the negotiating process. This would mean, for example, in the context of agricultural negotiations within the World Trade Organization (WTO), states are required to assess proposed changes for their impact on food security, particularly that of vulnerable populations. In this regard, states would be required to sustain or increase levels of food security; a diminution would be a violation of their obligations under international law. The deliberate rejection of a food security initiative on the grounds of self interest would therefore constitute a *prima facie* violation of art 2 of *ICESCR*. The obligation to respect also requires that when states participate in multilateral financial institutions, they do so in accordance with their obligation to protect human rights beyond their own borders. To be compliant with the right to respect, states would need to ensure that a human rights impact analysis is undertaken before seeking structural changes to the economies of developing countries.

The obligation to 'protect' human rights is a positive obligation to prevent third parties from interfering with social and economic rights. This would mean, for example, that countries in the developed world are required to regulate the actions of the multinational corporations which are domiciled within their jurisdiction but which may operate in contexts where social and economic rights are under threat. A positive example of an initiative to protect rights is the decision of states within the WTO to limit the intellectual property rights of pharmaceutical corporations with patents over lifesaving medication. At the commencement of the *Doha Round of Negotiations*, arising out of the 4th Ministerial Conference of the WTO in 2001, it was recognised that the need to address the global HIV/AIDS pandemic required that the *Agreement on Trade-Related Aspects of Intellectual Property Rights*¹⁷ regulating intellectual property should be amended in order to allow developing countries to produce cheap generic drugs and to import generic drugs into their jurisdiction.¹⁸ Wealthy nations were not allowed to access these same flexibilities, because governments in the developed world have access to significant health budgets with which to subsidise access to medicines for their citizens.

The obligation to 'facilitate' fulfilment of human rights requires that the international community scrutinise their national trade and foreign policies for congruence with *ICESCR*. In the context of the right to food, for example, this evokes the question of whether the massive subsidies that the European, Japanese and North American governments provide to their farmers are in violation of the obligation to facilitate because they prevent developing nations from accessing their markets. Recent studies show that even if these subsidies were eliminated, it is likely that the primary beneficiaries would be farmers from countries such as Australia and New Zealand because they have both the technology and the systems to take advantage of new markets.¹⁹ This information suggests a correlative obligation on the part of the international community to provide technical assistance and supply side capacity building to ensure that farmers in the developing world have the opportunity to benefit from the wealth created by trade. The obligation to facilitate would also require that, at a minimum, the international community seriously consider proposals such as Gordon Brown's call to cancel 100% of multilateral debt in order to allow debt repayments to be re-channelled into programs to promote economic, social and cultural rights.

Finally, the obligation to fulfil human rights requires that the international community step in to give direct assistance where resources are insufficient. In 1971, the international community set the (modest) benchmark that 0.7% of gross national income (GNI) should be allocated to ODA.²⁰ It is questionable whether the international standard is sufficient to satisfy the *ICESCR* standard. Notwithstanding such a limitation, the majority of nations have failed to meet even that target. It is only in the last couple of months that the governments of the European Union have set a timetable for achieving the 0.7% target. During 2001, in its Final Report on France's periodic report on its implementation of *ICESCR*, CESCR urged the French government to set a timetable for achieving the international benchmark.²¹ CESCR's recommendations are significant in that they point out that the standard for what constitutes the 'maximum available resources' is not a matter for determination for each state. Rather, it is subject to determination by the international community as a whole.

It is important to note in considering the obligation to fulfil that, although the quantum of aid is important, human rights law also suggests guidelines about how

14. See generally, Amartya Sen, *Development as Freedom* (1999).

15. UNAIDS/World Health Organization, *AIDS Epidemic Update* (2004) 5.

16. World Health Organization, *World Health Report* (2004) 21.

17. Opened for signature 15 April 1994, 1869 UNTS 299 (entered into force 1 January 1995).

18. See *Declaration on the TRIPs Agreement and Public Health*, WT/MIN(01)DEC/2 (adopted 14 November 2001).

19. M Ataman Aksoy and John C Beghin (eds), *Global Agricultural Trade and Developing Countries* (2005).

20. Based on *International Development Strategy for the Second United Nations Development Decade*, GA Res 2626 (XXV), UN GAOR, 25th sess, 1912th plen mtg (1970).

21. CESCR, *Concluding Observations of the Committee on Economic, Social and Cultural Rights: France*, UN Doc E/C.12/1/Add.72, [24] (2001).

that aid should be spent: it must be directed towards the realisation of economic, social and cultural rights (in a way that is consistent with civil and political rights). According to this logic, while the pursuit of economic growth may be important, in and of itself it is not sufficient unless economic growth results in the realisation of rights. In this regard some of the policies of the World Bank and International Monetary Fund, among others, may not qualify as representing 'international cooperation' under *ICESCR* because the target of economic growth has been pursued at the expense of the social and economic rights of citizen communities.

Australia's record in international assistance and cooperation

In September 2000, Prime Minister Howard joined with 146 other world leaders to establish a new agenda for global development. The eight millennium development goals (MDGs) set out in the *United Nations Millennium Declaration* have now been endorsed by all 191 member states of the UN.²² Taken together, they will not result in the realisation of all economic, social and cultural rights; and there are those within the human rights movement who have critiqued the MDGs as being an unacceptable compromise. What they do provide, however, is a set of targets which will go some way to achieving the social and economic rights of people in developing countries by addressing issues including extreme poverty, hunger, education, gender, maternal and child health, the environment, and diseases such as HIV/AIDS. The MDGs require that developing countries work to improve their governance systems and devote their national resources to poverty reduction. Goal 8 of the MDGs is specifically targeted at the developed world. Among other things, it requires wealthy nations to commit resources to poverty reduction through ODA, to cancel debts that cannot be paid, and to cooperate through the international trading system to improve access to markets for developing countries.

Successive Australian governments have a reasonably sound record in promoting the effective realisation of the social and economic rights of their own citizens, though the living conditions of some indigenous communities continues to be of significant concern to both governments and CESCR. Australia's response to the MDGs, however, reflects its somewhat uneven engagement with the obligation to provide assistance and cooperation. Australia has ratified the *ICESCR*.²³ In practice, Australian governments have recognised that collaborating with others to promote the realisation of economic, social and cultural rights is in its national interest; indeed, one of the stated purposes of Australia's aid program is to serve the 'national interest'.²⁴ Australia has also, however, maintained the right to vary the level, scope and type of collaboration and assistance in line with that interest. As previously mentioned, international human rights law provides for a higher standard: that of devoting the 'maximum available resources' to development and human rights

realisation as set by the international community acting as a whole. The competent body to judge Australia's compliance with its obligations is CESCR.

We do not mean to suggest that there are no redeeming features in Australia's record of international assistance beyond and supplementary to its aid initiatives. In international trade negotiations, where Australia's interests as an agricultural exporter are aligned with many developing countries, Australia has provided a leadership role within the Cairns Group — a coalition of agricultural exporting countries — and is supportive of initiatives which aim to protect the social and economic rights of individuals within developing countries.²⁵ In the current negotiations for example, Australia has been supportive of the creation of a class of Special Products which will exempt staple foods from liberalisation disciplines within the *Agreement on Agriculture*.²⁶ In 2003, Australia granted duty and quota free access to goods from the world's poorest countries. From a rights-based perspective this decision represents a good policy initiative because it had a relatively small impact on Australian producers but is expected to result in an increase in trade from some of Australia's poorest neighbours (Cambodia and Bangladesh) which will provide employment within the textile industry.

However, it is particularly in the area of aid that Australia can and should do more. The Australian government acted as a world leader in its timely and generous response to the Indian Ocean tsunami at the beginning of this year. In relation to the broader aid program, however, our commitment for the 2005–06 financial year is 0.28% of GNI, well below the international standard of 0.7%. The current Australian government's consistent refusal to set a timetable for reaching the international standard comes at a time of record budget surpluses and steadily expanding GNI. In short, we can afford it. It would cost just \$0.48 per day extra for all Australians to reach the 0.7% target.²⁷ Even if it were assumed that two million Australians were unable to pay the increased tax burden, it would still only cost an extra \$0.57 per day to achieve the target.²⁸ It is difficult to imagine a justification to excuse Australia from reaching the 0.7% of GNI threshold expected by the international community.

Beyond law: the prospects for the future

It would be a mistake to imply that the entire force of the obligation to provide international assistance and cooperation for the realisation of economic and social rights is reducible to human rights law. In some respects, the recognition of the obligation to provide assistance is better understood as a result of the moral insight that the inherent dignity of each individual demands action when that dignity comes under threat. Historically, law has served to delimit the idea of community, to divide individuals on the basis of their membership within a particular jurisdiction. The moral claim of all individuals to human dignity and equal treatment predates and far exceeds the limited vision presented by international human rights law. In

22. *United Nations Millennium Declaration*, GA Res 55/2, 55th sess, Agenda Item 60(b), UN Doc A/RES/55/2 (2000).

23. Australia ratified *ICESCR* on 10 December 1975.

24. AusAID, 'Why Australia Gives Aid', AusAID website <www.ausaid.gov.au/makediff/whats.cfm#why> at 1 July 2005.

25. See generally <www.cairnsgroup.org> at 2 August 2005.

26. *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995), annex 1A (*Agreement on Agriculture*) 1867 UNTS 190.

27. Brett Parris, 'World Vision Australia Aid Budget Analysis (2005) (internal document)'.

28. *Ibid.*

It is generally accepted that obligations of states parties under international human rights law include obligations to respect, protect and fulfil human rights.

the absence of the requirement to provide form and content to the institutional design of rights, the moral view of human rights does not recognise the validity of distance: the right of my neighbour to be free from hunger carries no greater weight than the equivalent right of those who currently experience hunger in Burundi, Cambodia or Ecuador.

Peter Singer's morality tale of the imperative to help a child who is drowning in a shallow pond continues to be powerfully instructive. Singer posits that the obligation to assist is based on the relative moral weight of the passer by whose clothes get dirty because they enter the pond to rescue the child and the potential death of the child.²⁹ In a moral universe the obligation to act is both obvious and compelling because international cooperation and assistance represents an action which has only a minor impact on those who assist, but can prevent serious injury to those receiving the assistance.

It has not, however, been through a moral epiphany that the obligation to promote the realisation of economic, social and cultural rights has traditionally been recognised. Rather, it is in the context of a community in which the bonds of solidarity render massive inequality socially unacceptable. Historically, the trend towards the social welfare state was a result of the twin developments of an increase in wealth and the development of a national consciousness: the immiseration of the working classes during the industrial revolution called forth action from those who saw such degradation as being incompatible with membership of a civilised society.

The opportunity offered by international human rights discourse is the possibility of redefining community in ways that focus on the shared experience of what it means to be human, notwithstanding (and indeed, celebrating) obvious cultural differences. The revolution in information technology makes this possible in ways that were simply out of the question a generation ago; the violation of the social and economic rights of the individual is no longer hidden by a tyranny of distance. The political challenge is to create new forms of social solidarity on which a demand for positive action to address the ongoing violations of economic, social

and cultural rights can be built. In the words of Nelson Mandela at the launch of the 'Make Poverty History' Campaign in Trafalgar Square:

Overcoming poverty is not a gesture of charity. It is an act of justice. It is the protection of a fundamental human right, the right to dignity and a decent life.³⁰

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29. Peter Singer, cited in Chris Brown, *Sovereignty Rights and Justice: International Political Theory Today* (2002) 162.

30. Nelson Mandela, 'Make Poverty History' (Speech delivered at the 'Make Poverty History' Campaign Launch, Trafalgar Square (London), 3 February 2005).

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